GNANASEGARAN PARARAJASINGAM

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MAHADEV SHANKAR JCA
ABDUL MALEK AHMAD J
[CRIMINAL APPEAL NO: W-09-5-95]
25 OCTOBER 1995

CRIMINAL LAW: *Penal Code, s. 409 - Criminal breach of trust - Ingredients - Whether there was conversion of entrusted moneys - Whether conviction proper*

EVIDENCE: *Documentary evidence - Computer produced documents - Admissibility - Section 90A Evidence Act 1950 - Scope and effect*

LEGAL PROFESSION: *Solicitor and client - Client's account - Whether solicitor could operate more than one client's accounts - Improper management of account - Using moneys in one client's account to settle solicitor's liability to another client - Whether a criminal offence - Solicitors' Account Rules 1978, rr. 3(2), 7(1)(a)*

The appellant, while acting as the complainants' solicitor, was entrusted with dominion over two separate sums of moneys belonging to the complainants, namely RM6576.16 and RM133,000. The appellant later deposited these sums of moneys into his office and client's accounts respectively. Evidence was adduced by PW10 ('Zainal'), the Bank officer in charge of the two accounts, that as of 27 May 1988, when the Bank decided to close the accounts, the respective credit balances of the accounts stood at RM401.02 and RM39.69 respectively. The appellant had not by then remitted any payment to the complainants, and the Courts below held that criminal breach of trust in the circumstances had been proved against the appellant.

The appellant appealed and argued that the learned Judge was wrong in admitting and acting on Zainal's evidence. It was not in dispute that in giving his testimony, Zainal relied mainly on the computer printouts which in turn highlighted the various transactions that the appellant had executed in respect of the two sums of money. It was also not in dispute that sub-s. (1) of s. 90A of the Evidence Act 1950 ('the Act') allows the production of such computer generated documents, provided that there is evidence that they were produced by a computer and that the computer had produced them in the

course of its ordinary business. Before the learned appeal Judges herein, the appellant argued, however, that, sub-s. (1) apart, it was still incumbent on Zainal to produce a **certificate** under sub-s. (2) of s. 90A certifying that the documents were in fact produced by a computer. And since no such certificate was produced, Zainal's evidence, so the appellant contended, ought to be rejected.

Held:
Per Shaik Daud Ismail JCA

[1] The Sessions Court Judge was right in finding that misappropriation had occured between the dates the various amounts were deposited in the accounts and the dates the accounts were closed.

[1a] When there is evidence that money entrusted to the appellant and deposited in a bank had been dissipated by him then the issue of him applying to the Court for a distribution order would not constitute any defence, as the money is no longer there to be distributed. This line of defence cannot raise any doubt on the prosecution's case.

[2] Section 90A of the Evidence Act 1950, which has seven sub-sections, should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers.

[2a] Sub-section (1) of s. 90A allows the production of computer generated documents or statements if there is evidence, firstly, that they were produced by a computer, and secondly, that the computer produced them in the course of its ordinary business. However, once the prosecution adduce evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s. (2), as sub-s. (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

[2b] In the present case, since Zainal had stated that the statement of accounts were computer printouts, the first part of sub-s. (1) has been proved and it would be superflous for him to issue a certificate under sub-s. (2). Once the Court accepts the evidence of Zainal, and there is no reason for the Court not to, the prosecution has succeeded in proving what s. 90A(1) requires them to prove, namely that such document was produced by the computer, and in view of the deeming provisions of sub-s. (6), the second part is also proved. Hence, there is no reason for the Court to reject the whole of the evidence of Zainal.

Per Mahadev Shankar JCA (concurring)

[1] Section 90A was enacted to bring the "best evidence rule" up to date with the realities of the electronic age. The effect of s. 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to Court provided he did so in the course of the ordinary use of the computer.

[1a] Zainal was the branch officer in charge of all the operations of the branch. He was therefore responsible for the conduct of the activities of the branch for which that computer was used. If he chose he could have issued a certificate as required by s. 90A(2) and without his actual presence all the computer generated documents would have been admitted in evidence as provided by s. 90A(1). The *viva voce* evidence of the man in the witness box counts for more than a certificate issued by him.

[2] The charges against the accused were conclusively proved. In the case of the first charge, the conversion took place as soon as the cheque was paid into the accused's office account because in effect he put the money into his own pocket. As for the second charge, even if the accused had a good reason for delaying payment (and he had none), conversion was conclusively proved when the total amount in the client's account shrank below the total amount due to the complainants.

[3] The prosecution cannot be expected to prove a negative. The contention that there was another client's account where other moneys were being kept in reserve to meet this liability goes to defence and s. 106 of the Evidence Act applies. That burden is on the accused because it is a fact specially within his knowledge.

[3a] It would not have helped the accused even if he had led evidence to show that he had other client's accounts where individually or cumulatively the credit balances therein had exceeded RM133,000. Whilst the Solicitors' Account Rules 1978, r. 3(2) permits a solicitor to maintain more than one client's account, r. 7(a)(i) only permits the withdrawal of a client's money "for a payment to or on behalf of **the** client". The effect of r. 7(a)(i) is that the complainants' money could only be taken out to pay the complainants or to their order. To use one client's money to settle a solicitor's liability to some other client is a criminal offence.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG JENAYAH: *Pecah amanah jenayah - Intipati - Samada berlaku pelesapan terhadap wang yang diamanahkan - Samada sabitan betul - Kanun Keseksaan s. 409*

KETERANGAN: *Dokumen - Dokumen yang diterbitkan oleh komputer - Kebolehterimaan - Seksyen 90A Akta Keterangan 1950 - Skop dan kesan*

PROFESYEN UNDANG-UNDANG: *Peguamcara dan anakguam - Akaun klien - Samada peguamcara boleh mengendalikan lebih dari satu akaun klien - Pengendalian tidak wajar akaun - Menggunakan wang di dalam satu akaun klien untuk membayar liabiliti peguamcara terhadap seorang klien lain - Samada satu kesalahan jenayah - Peraturan-peraturan Akaun Peguamcara 1978, pp. 3(2), 7(a)(i)*

Perayu, sewaktu bertindak sebagai peguamcara pengadu, telah diamanahkan dengan keempunyaan dua jumlah wang yang dimilikki oleh pengadu, iaitu RM6576.16 dan RM133,000. Perayu menyimpan wang-wang tersebut masing-masingnya di dalam akaun pejabatnya dan akaun kliennya. PW10 ('Zainal'), pegawai Bank yang mengendalikan kedua-dua akaun tersebut, telah memberi keterangan bahawa setakat 27 Mei 1988, bilamana Bank memutuskan untuk menutup akaun-akaun berkenaan, baki kredit di dalam masing-masing akaun tinggal sebanyak RM401.02 dan RM39.69. Perayu pada waktu itu tidak membuat apa-apa bayaran kepada pengadu, dan Mahkamah di bawah mendapati bahawa pecah amanah jenayah dalam halkeadaan sedemikian telah dibuktikan terhadap perayu.

Perayu merayu dan berhujah bahawa Hakim yang bijaksana adalah salah apabila menerima-masuk keterangan Zainal dan bergantung kepadanya. Ianya tidak dinafikan bahawa ketika memberikan keterangannya, Zainal banyak bergantung kepada cetakan-cetakan komputer yang mendedahkan transaksi-transaksi yang dibuat oleh perayu berhubung kedua-dua jumlah wang tersebut. Ianya juga tidak dinafikan bahawa seksyen kecil (1) s. 90A Akta Keterangan 1950 ('Akta') membenarkan pengemukaan dokumen yang diterbitkan oleh komputer sedemikian, dengan syarat terdapat keterangan bahawa dokumen tersebut diterbitkan oleh komputer dan bahawa komputer menerbitkannya "in the ordinary course of its business". Dihadapan Hakim-hakim rayuan yang bijaksana di sini, perayu bagaimanapun berhujah, bahawa, walau apapun yang dikatakan oleh seksyen kecil (1), adalah menjadi kewajipan Zainal untuk mengemukakan satu **sijil** di bawah seksyen kecil (2) s. 90A yang menentusahkan bahawa dokumen-dokumen berkenaan adalah sebenarnya diterbitkan oleh komputer. Dan oleh kerana tiada sijil sedemikian dikemukakan, keterangan Zainal, perayu seterusnya berhujah, haruslah ditolak.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Hakim Sesyen adalah betul apabila mendapati bahawa berlaku pelesapan di antara tarikh-tarikh jumlah wang berkenaan disimpan di dalam akaun-akaun dan tarikh-tarikh akaun-akaun tersebut ditutup.

[1a] Bila terdapat keterangan yang menunjukkan bahawa wang yang di amanahkan kepada perayu dan yang disimpankannya di bank itu telah dihakisi olehnya, maka isu bahawa beliau telah memohon kepada Mahkamah untuk perintah pembahagian tidak boleh menjadi suatu pembelaan, oleh kerana tiada lagi wang untuk dibahagikan. Pembelaan sebegini tidak boleh mencetuskan apa-apa keraguan terhadap kes pendakwaan.

[2] Seksyen 90A Akta Keterangan 1950, yang mengandungi tujuh seksyen kecil, tidak harus dibaca secara berasingan. Seksyen ini harus dibaca bersesama kerana ia merupakan satu gugusan peruntukan yang merperkatakan tentang kebolehterimaan dokumen-dokumen yang diterbitkan oleh komputer.

[2a] Seksyen kecil (1) s. 90A membenarkan pengemukaan dokumen atau pernyataan yang diterbitkan oleh komputer jika terdapat keterangan, pertamanya, bahawa dokumen atau pernyataan tersebut diterbitkan oleh komputer, dan kedua, bahawa komputer telah menerbitkannya "in the ordinary course of its business". Bagaimanapun, sebaik sahaja pendakwaan memberikan keterangan melalui seorang pegawai bank bahawa sesuatu dokumen itu telah diterbitkan oleh komputer, pendakwaan tidak lagi bertanggungan untuk mengemukakan satu sijil di bawah seksyen kecil (2), oleh kerana seksyen kecil (6) memperuntukkan bahawa sesuatu dokumen yang diterbitkan oleh komputer hendaklah diandaikan sebagai telah diterbitkan oleh komputer tersebut "in the course of its ordinary use".

[2b] Dalam kes ini, oleh kerana Zainal telah menyatakan bahawa penyata akaun berkenaan adalah cetakan komputer, bahagian pertama seksyen kecil (1) telah pun terbukti dan adalah sia-sia baginya untuk mengemukakan sijil di bawah seksyen kecil (2). Sebaik sahaja Mahkamah menerima masuk keterangan Zainal, dan tiada sebab mengapa Mahkamah tidak harus berbuat demikian, pihak pendakwaan telah berjaya membuktikan apa yang dikehendakki oleh s. 90A(1), iaitu bahawa dokumen tersebut telah diterbitkan oleh komputer, dan mengambil kira peruntukan anggap yang terdapat dalam seksyen kecil

(6), bahagian kedua juga telah dibuktikan. Oleh hal yang demikian, tiada sebab mengapa Mahkamah harus menolak keseluruhannya keterangan Zainal.

Oleh Mahadev Shankar HMR (menyetujui)

[1] Seksyen 90A telah digubal untuk mewujudkan "kaedah keterangan terbaik" sejajar dengan realiti alaf elektronik. Kesan s. 90A(1) dalam senario di sini ialah ianya tidak lagi perlu untuk memanggil teller atau kerani bank yang memasukkan data yang berkenaan tersebut ke Mahkamah dengan syarat beliau berbuat demikian dalam kegunaan biasa komputer tersebut.

[1a] Zainal adalah Pegawai Cawangan yang bertanggungjawab terhadap operasi Cawangan berkenaan. Beliau dengan itu adalah bertanggungjawab terhadap semua aktiviti yang dijalankan oleh Cawangan berkenaan untuk yang mana komputer tersebut telah digunakan. Beliau boleh memilih untuk mengemukakan satu sijil seperti kehendak s. 90A(2) tanpa perlu hadir di Mahkamah, dan tanpa kehadirannya semua dokumen yang dicetak oleh komputer tersebut akan diterima-masuk sebagai keterangan di bawah s. 90A(1). Keterangan *viva voce* seseorang saksi di dalam kandang saksi adalah lebih kuat dari sijil yang dikeluarkan olehnya.

[2] Tuduhan-tuduhan terhadap tertuduh telah dibuktikan dengan muktamadnya. Bagi tuduhan pertama, pelesapan berlaku sebaik sahaja cek berkenaan dimasukkan ke dalam akaun pejabat tertuduh kerana kesan sebenar perbuatan itu ialah tertuduh telah memasukkan wang ke dalam poketnya sendiri. Berhubung tuduhan kedua, jikapun tertuduh mempunyai alasan yang kuat untuk melengahkan pembayaran (beliau tidak mempunyai apa-apa alasan pun), pelesapan terbukti dengan secara muktamad apabila jumlah penuh wang yang ada di dalam akaun klien menjadi kurang dari jumlah yang sepatutnya dibayar kepada pengadu.

[3] Pendakwaan tidak perlu membuktikan suatu perkara negatif. Pengataan bahawa terdapat satu lagi akaun klien di mana wang-wang lain telah disimpan untuk membayar liabiliti di sini adalah isu untuk pembelaan dan s. 106 Akta Keterangan adalah terpakai. Beban pembuktiannya adalah terletak atas tertuduh kerana ianya adalah satu fakta yang hanya beliau mengetahuinya.

[3a] Ianya tidak dapat membantu tertuduh walaupun beliau boleh membuktikan bahawa wujud beberapa akaun klien lagi di dalam mana tersimpan sejumlah wang yang melebihi RM133,000. Sungguhpun benar bahawa k. 3(2) Kaedah-kaedah Akaun Peguamcara 1978 mengizinkan

seseorang peguamcara mengurus lebih dari satu akaun klien, k. 7(a)(i) hanya membenarkan pengeluaran wang seseorang klien "untuk pembayaran kepada atau bagi pihak klien **tersebut**". Kesan k. 7(a)(i) ialah wang pengadu hanya boleh dikeluarkan untuk membayar pengadu atau mengikut arahannya. Menggunakan wang seorang klien untuk menyelesaikan liabiliti peguamcara terhadap klien lain adalah satu kesalahan jenayah.

[Rayuan ditolak.]

Cases referred to:
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Lyn Hon Yap v. Public Prosecutor [1956] MLJ 226 ***(refd)***
Perumal v. Public Prosecutor [1970] 2 MLJ 265 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 322(3)
Evidence Act 1950, ss. 3, 32(b), 60, 90A(1), (2), (4), (6), 90B, 90C, 106
Penal Code, s. 409
Solicitors' Account Rules 1978, rr. 3(2), 7(a)(i)

[Appeal from High Court Malaya, Kuala Lumpur; Criminal Appeal No: WPRJ Bil: 42-80-93]

For the appellant - Shahul Hameed Amirudin; M/s Albar Zulkifly & Yap
For the respondent - Mohamed Yusof Zainal Abiden, DPP

[Editor's note: The following judgments were received on 2 July 1997.]

JUDGMENT

Shaik Daud Ismail JCA:

The appellant, an advocate and solicitor, was charged on 30 September 1993 before the Kuala Lumpur Sessions Court with two counts of criminal breach of trust. On the first count, he was charged that between 12 June 1987 and 19 May 1988, as an agent, in that in his capacity as the solicitor of the estate of one Tee Seng Pun @ Tee Seng Yeat (deceased) and being entrusted with dominion over a sum of RM6,576.16, he had committed criminal breach of trust of the said sum and had thereby committed on offence under s. 409 of the Penal Code. On the second count, he was charged that other vehicle through a firm of solicitors Messrs. Tong Teck Yong & Co. on 18 October 1983. Eventually, the appellant's firm Messrs. P.G. Segran & Associates took over the case. The appellant's firm was also involved in making a claim with the Employees Provident Fund (EPF). It is common ground that the firm of Messrs. P.G. Segran & Associates was wholly owned by the appellant. The

case was eventually settled out of Court and a consent judgment was recorded by the High Court on 19 May 1987 whereby the Court ordered as follows:

(a) the complainant was awarded RM98,700;

(b) RM8,000 was awarded to the estate of Tee Seng Pun;

(c) the complainant was also awarded an additional RM11,300 as compensation;

(d) the complainant's son was awarded RM2,500 as compensation;

(e) the complainant's sister awarded RM2,500 as compensation;

(f) costs agreed or to be taxed to plaintiffs.

Following this consent order, Pacific and Orient Insurance Sdn. Bhd. made four payments to the appellant totalling RM133,000, which included RM10,000 as agreed costs, to be paid over to the plaintiffs as ordered by the Court. The amounts were then paid to the appellant's firm which went into the client's account at the then United Asian Bank. This amount represented the subject matter of the second between 22 September 1987 and 27 May 1988 being an agent and in his capacity as solicitor of one Ng Ju Hiang, Ng Juey Hung, Tee Yit Hong and the estate of one Tee Seng Pun @ Tee Seng Yeat (deceased) and being entrusted with dominion over a sum of RM133,000, he had committed criminal breach of trust of the said sum and had thereby committed an offence under s. 409 of the Penal Code.

After a lengthy trial, the Sessions Court convicted the appellant and sentenced him on the first count to imprisonment for 12 months and on the second count to imprisonment for 18 months. The Court also ordered the sentences to run concurrently. His appeal to the High Court was on 21 March 1995 dismissed and the Court confirmed the convictions and sentences imposed. In addition, the High Court purporting to act on its own volition under the provisions of s. 322 ordered the appellant to pay RM10,000 as costs in default of which he shall suffer an additional imprisonment of 12 months. The appellant was eventually released on bail pending appeal to this Court.

The facts of the case that on 19 September 1981 Ng Ju Hiang the complainant together with her sister Ng Juey Hong and son Tee Yit Hong were travelling in a taxi driven by her husband Tee Seng Pun. An accident occurred and Tee Seng Pun died and the complainant, her sister and her son were injured. As a result of the accident, the complainant took legal action against the driver, of the charge.

In respect of the first charge, the subject matter was the EPF contribution belonging to the late husband of the complainant. EPF made a direct payment of RM6,576.16 to the complainant by issuing her a warrant dated 13 October 1986 for the payment. The complainant then deposited this warrant into her savings account at the Public Bank Bhd. She then dutifully informed the appellant of this payment. On hearing this, the appellant requested her to hand over the EPF money to him so that he could distribute the same to all the beneficiaries after obtaining letters of administration of the estate of her late husband. Believing the appellant, the complainant then issued him a cheque for the above amount. The appellant should rightly have deposited this amount into the client's account but instead deposited it into his office account at the then United Asian Bank Bhd. on 12 June 1987.

According to the evidence of the operating officer of United Asian Bank Bhd., the appellant opened the client's account and the office account at the bank on 19 November 1986 and he made himself the sole signatory for both the accounts. According to the witness, from the time the two accounts were opened, the appellant made a number of withdrawals and deposits based on the statement of accounts. He added that on 19 May 1988, when the office account was closed by the bank for violating Bank Negara regulations by issuing bad cheques on at least three occasions within a period of six months, there was left in that account a meagre sum of RM401.02. As for the client's account which was also closed for the same reason on 27 May 1988, there was left also a meagre sum of RM39.69.

The evidence disclosed that after both the above mentioned accounts were closed, the appellant on 28 November 1988 filed an application by way of a summons-in-chambers for a distribution order. This application came up before High Court Judge NH Chan (as he then was) who ordered some amendments to be made to exclude the appellant's firm as one of the beneficiaries. Thereupon the application was adjourned to another date. Following this, an amended application was indeed filed and the Court gave 26 October 1990 as the hearing date. Unfortunately, on that date, no one turned up and the Court struck out the application. No application for reinstatement or no fresh application was filed thereafter.

In the meantime, the complainant and the other beneficiaries had still not been paid anything even after several enquiries made. Finally they lost their patience and appointed another firm of solicitors namely Messrs. Lee, Pereira & Tan to take over. After several requests to hand over the relevant files to the new solicitors fell on deaf ears, the complainant was advised to lodge a police report which she did on 3 September 1991.

By a letter dated 13 October 1991, the appellant's firm requested the complainant and her sister to call at their office. On 8 November 1991, she and the other beneficiaries presented themselves at the appellant's office where one clerk of the firm gave the following cheques:

(a) a cheque dated 1 November 1991 for RM33,183.33 in the name of Ng Ju Hiang as trustee for Tee Yit Hong;

(b) a cheque dated 1 November 1991 for RM2,500 in the name of Ng Ju Hiang as trustee for Tee Yit Hong;

(c) a cheque dated 1 November 1991 for RM33,183.33 in the name of Ng Ju Hiang;

(d) cheque dated 1 November 1991 for RM2,500 in the name of Ng Juey Hong.

They were also given a statement of accounts with three indemnity receipts and an assurance that a cheque for Tee Shee Ping will be sent by post. Apart from the above, they were not paid anything else. There hardly appear to be any dispute of the facts as above presented. There was no dispute of the consent judgment, of the opening of the two accounts, of the receipt of the judgment sum from the insurance company, of depositing them into these two accounts and of the various withdrawals made from these two accounts and the fact that the accounts were closed by the bank with the meagre sums mentioned earlier remaining in the accounts and of the non-payment from the time of receipt of the money until the closure of the accounts. The main thrust of the argument on behalf of appellant appears to be solely on the admissibility of the evidence which tend to establish the act of misappropriation, of which I will avert to later.

The Sessions Court Judge having been satisfied that a *prima facie* case had been out in accordance with the test as expounded by the Federal Court in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 called upon the appellant to enter his defence on both charges. The appellant elected to give a written statement from the dock and being a lawyer himself obviously understood the consequences thereof. Apart from his written statement, the appellant called no other witnesses and presented no other evidence.

The gist of his statement seems to be that firstly, he as the solicitor for the complainant was entitled to keep the entire RM10,000 ordered as agreed costs. Secondly, as for the EPF money, the subject matter of the first charge was by mistake credited into his office account instead of the client's account. He also questioned the amount stated in the second charge as being erroneous. According to him, the sums mentioned in the consent judgment for him to

distribute were only RM98,700 and RM8,000. Finally, he said that the reason why he did not make the payments was because he was waiting for the sealed copy of the distribution order from the Court.

The Sessions Court Judge found that appellant's defence that he did not make the payments because he was waiting for the distribution order from the Court cannot be accepted since both the office and the client's accounts at the United Asian Bank Bhd. had been closed before the appellant made the first application to the High Court for a distribution order. The Court found that misappropriation had occurred between the dates the various amounts were deposited in the accounts and the dates the accounts were closed. We have no reason to disagree with the Sessions Court Judge on this. When there is evidence that money entrusted to the appellant and deposited in a bank had been dissipated by him then the issue of him applying to the Court for a distribution order would not constitute any defence, as the money is no longer there to be distributed. We would add that it seems strange that he set up this defence since he did make a payment totalling RM71,366.66 even without any distribution order after the police report had been lodged. This line of defence cannot raise any doubt on the prosecution's case.

At the hearing of the appeal, although several grounds were put forward learned Counsel Encik Shahul Hameed abandoned them and argued only on one ground which according to him would decide the fate of the whole case. The ground relied upon is on the admissibility of the evidence of the bank officer on the operation of the two accounts at the United Asian Bank Bhd. and on the provisions of s. 90A of the Evidence Act 1950.

It is a fact that the prosecution relied on the evidence of the operations officer of the United Asian Bank Bhd. (no was Bank of Commerce) one Zainal Abidin bin Mohamed who testified that in 1986 he was the operations officer at the Jalan Masjid India Branch of the United Asian Bank Bhd. and in that capacity was in charge of the operations of current accounts of the bank. He confirmed that in 1986 the appellant's firm operated an office and also a client's account at the branch. He produced the relevant statements for both accounts as well as paying in slips, cancelled cheques and other relevant documents showing the opening and operation of these two accounts. It is also not disputed that the prosecution relied on the evidence of this officer to show movements of money from these two accounts from the time of their opening and their final closure to establish that money entrusted to the appellant had been appropriated for his personal use. He also testified and confirmed that the various statements he produced were computer printouts. He also confirmed that the bank closed both the accounts for reasons stated earlier. It must be pointed out that the notes of evidence shows that cross examination of this particular witness was very short and only on the issue of his capacity and ability to identify

signatures and nothing else. It is now the submission of learned Counsel for the appellant that the whole of the said evidence of this witness is totally hearsay and therefore inadmissible. The prosecution, of course, was relying on the provisions of the newly added s. 90A of the Evidence Act 1950 which came into force on 16 July 1993 (by Act A851). This section is a special one concerned with the admissibility of documents produced by computers and of statements contained therein. This section reads:

> 90A(1) In any criminal or civil proceedings a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

While accepting this provision as enabling the prosecution to tender such document or statement, learned Counsel submitted that it could only be admitted under s. 90A(1) if the prosecution not only proved that such document is produced by a computer but also that it is produced in the course of its ordinary use and in order to do this it is incumbent upon the prosecution to produce a 'certificate' signed by someone solely in charge of the computer which produced the printout as required by sub-s. (2) of s. 90A. This sub-section provides:

> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the Court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

He further submitted that failure to produce this certificate is fatal and would render the statement of accounts inadmissible and the evidence of the bank officer hearsay. Therefore, he concluded that since such a certificate was not produced, there is no evidence whatsoever that the printout produced by the computer was in the course of its ordinary use.

On reading through s. 90A of the Evidence Act 1950, we are unable to agree with the construction placed by learned Counsel. First and foremost s. 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers. As stated earlier, s. 90A was added to the Evidence Act 1950 in 1993 in order to provide for admission of computer produced documents and statements as in this case. On our reading of this section, we find that under sub-s. (1) the law allows the production of such computer generated documents or statements if there is evidence that they were

produced firstly by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is, it 'may' be proved by the production of the certificate as required by sub-s. (2). Thus sub-s. (2) is permissive and not mandatory. This can also be seen in sub-s. (4) which begins with the words 'Where a certificate is given under sub-s. (2) ...' These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer it is not incumbent upon them to also produce a certificate under sub-s. (2) as sub-s. (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. It is also our view that the prosecution can tender the computer printout through the investigating officer without calling any bank officer. Therefore, when they adopt this way of proof then it would be incumbent upon them to establish that the document is produced by a computer in the course of its ordinary use by producing the certificate under sub-s. (2). The reason seems to me to be obvious as the investigating officer will be in no position to say that the printout is produced by a computer in the course of its ordinary use, as he is not an officer of the Bank.

In the present case Zainal Abidin bin Mohamed the person in charge of the operations of current accounts testified that the statement of accounts were computer printouts. Therefore, in my view, the first part of sub-s. (1) has been proved ie, that the document is a computer printout. It would be superfluous for him to issue a certificate under sub-s. (2) when first hand evidence that 'the document **so were produced by a computer**' was given by Zainal Abidin. It would be superfluous to have a provision such as in sub-s. (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal Abidin b. Mohamed is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is my view that when such an officer is not called, the court cannot rely on the deeming provision of sub-s. (6). Once the court accepts the evidence of Zainal Abidin b. Mohamed, and in this case I cannot see any reason whatsoever for the court not to, as there was no challenge by cross-examination, the prosecution has succeeded in proving what s. 90A(1) requires them to prove, that such document was produced by the computer and in view of the deeming provisions of sub-s. (6), the second part is also proved.

Since the appellant relied solely on this one ground we, find no merits in the argument of learned Counsel for the appellant that the Court should reject the whole of the evidence of Zainal Abidin bin Mohamed. We find more than

ample evidence of misappropriation and the appellant was rightly convicted. Before leaving this appeal there is one other aspect of this case which we dealt with ie, the order which the High Court made on its own volition in ordering the appellant to pay RM10,000 costs in default of which he was to be imprisoned for a further 12 months. Unfortunately, the learned Judge has not mentioned under which provision of the law he purportedly made this order, nor did he mention to whom should these costs be paid. In the light of s. 322(3) of the Criminal Procedure Code, it is our view that this additional order is not justified, and we therefore set it aside.

For the above reasons, we would therefore dismiss this appeal.

Mahadev Shankar JCA:

I have read the judgment of my brother YA Dato' Haji Shaik Daud bin Haji Mohd. Ismail with which I am in complete agreement. We were unanimous in our decision to dismiss this appeal. Nevertheless since the learned Deputy Public Prosecutor has specifically requested us for guidance on how s. 90A of the Evidence Act 1950 ('the Act') should be applied, I wish to add a few words of my own on this aspect of the case.

The evidence relating to the entire history of the operations of the accused's bank accounts with the Bank of Commerce ('the bank') was given by PW10 Encik Zainal Abidin bin Mohamed ('Zainal'). When he testified on 18 August 1993 he was an executive officer at the Bank's Head Office in Jalan Tun Perak. The offences charged were alleged to have occurred between 12 June 1987 and 27 May 1988 ('the relevant period') and took place in the Bank's branch office at Jalan Masjid India ('the branch').

Zainal's evidence-in-chief so far as is relevant to this aspect of the case was as follows. From 1986 he was the officer in charge of all the branch operations including the conduct of current accounts. In other words, to use the relevant words from s. 90A(2) of the Act he was the person who was responsible "for the conduct of the activities for which the ('branch') computer was used," during the relevant period.

On 19 November 1986 the accused opened a current account in the branch. Although Zainal did not personally handle this transaction, he was the branch officer responsible for verifying the accused's signature on all documents throughout the accused's relationship with the branch and was very familiar with the accused's signature. The opening form produced (Ex. P.41) was the original. It contained the accused's particulars, and his signature. It was designated "client's account". The computerised entry on this document gave details of the bank's code, the account number and the date. These were identified by Zainal.

The RM133,000 which was the subject matter of the second charge was paid into this account in four instalments of RM33,250 each on 22 September 1987, 19 October 1987, 18 November 1987 and 27 November 1987. The original paying-in-slips for each of these payments were produced. Each of these contained a computerised entry confirming that the branch had received these amounts. Photocopies of the cheques in favour of the accused were also produced which matched the pay-in-slips.

Zainal also produced the branch **office copies** of the monthly statements of this client's account from the day it was opened on 19 November 1986 up to the date it was closed on 27 May 1988 because three of the accused's cheques were dishonoured within six months. The monthly statements were generated by the branch computer. The closing balance was RM39.69. The four instalments aforesaid were reflected in the credit columns of these monthly statements against the dates on the paying-in slips.

After dealing systematically with each paying-in slip, the relevant cheque and the corresponding credit entry in the monthly statement, Zainal produced the cheques which the accused had drawn on this client's account. There were 51 transactions. 44 cheques were originals. Four had been "referred to drawer". Three had been lost in the course of the bank's renovation. Zainal personally identified the accused's signature on all the cheques produced.

With reference to the RM6,576.16 in the first charge Zainal testified that the accused had opened an office account with the branch on 19 November 1986. As with the client's account, Zainal produced the original account opening form with the accused's signature, and 14 computer generated monthly statements (ie, the office copies) from 28 May 1987 up to 19 May 1988 when the account was also closed because three cheques were dishonoured within six months. The significance of these dates is that instead of paying the RM6,576.16 into his client's account as he was bound in law to do, the accused paid the money into his office account on 12 June 1987. The original paying-in slip was produced with the computer entry confirming receipt (Ex. P51). The complainant had earlier identified the Public Bank cheque for this amount which he handed to the accused. Zainal also produced 135 cheques which the accused had drawn on this account leaving a closing balance of RM401.02. All the cheques matched the entries in the monthly statements.

Zainal was not challenged by defence Counsel on the accuracy of the entries in the documents produced. It was only on appeal that a point was raised that because a certificate was not produced under s. 90A(2) the prosecution had failed to prove its case.

The fallacy of this submission is easily demonstrated. Zainal was the branch officer in charge of all the operations of the branch. He was therefore responsible for the conduct of the activities of the branch for which that computer was used. If the chose he could have issued a certificate as required by s. 90A(2) and without his actual presence all the computer generated documents would have been admitted in evidence as provided by s. 90A(1). The *viva voce* evidence of the man in the witness box counts for more than a certificate issued by him.

There is a parallel here with "Consents to Prosecute" which are required under the Prevention of Corruption Act 1950. If a Deputy Public Prosecutor is present and goes on record when the accused is called upon to plead to an offence under this Act, no separate consent should be required. See *Lyn Hon Yap v. Public Prosecutor* [1956] MLJ 226, and *Perumal v. Public Prosecutor* [1970] 2 MLJ 265.

We need to remind ourselves that s. 90A was enacted to bring the "best evidence rule" up to date with the realities of the electronic age. Receipts for payments in and records of payments out of a bank account are keyed in by the tellers into the terminals at the counter, and the information is electronically stored in the bank's computer. The information so stored is not in itself visible to the naked eye. To become visible the raw data has to be projected on a video display unit and/or printout. So the definition of a "document" in s. 3 of the Evidence Act now provides that both the display on the video display unit, and the printout qualify as documents. The last two items in the **Illustrations** to the section have spelt this out.

The effect of s. 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to Court provided he did so in the course of the ordinary use of the computer.

This is a relaxation of the direct evidence rule in s. 60 of the Act beyond the extent to which its provisions have been diluted by s. 32(b) in the case of documents made in the ordinary course of business. A situation could thus arise under s. 90A(1) where the particular person who keyed in the information may not be individually identifiable, but the document would nevertheless be admissible.

Zainal gave evidence that the office copies of the monthly statements and the various other documents tendered by him had been handed to the police when the investigations were under way. Ordinarily, a document would only be admissible as evidence of the facts it contains if the record and the event recorded are contemporaneous. Section 90A(6) relaxes this requirement also. The contemporaneous document here is the data keyed in at the time of the

transaction. The printout is only a process of retrieval. By s. 90A(6) this retrieval can come after investigation or even after the trial has begun.

It is not necessary for me to say anything here about the far reaching effects of s. 90B and 90C of the Act. The accused did not dispute that he received the moneys which were the subject of the charges, that they were paid into these accounts and that he failed to pay them over to his clients despite numerous demands.

The charges against the accused were conclusively proved. In the case of the first charge, the conversion took place as soon as the cheque was paid into the accused's office account because in effect he put the money into his own pocket. As for the second charge, even if the accused had a good reason for delaying payment (and in my view he had none), conversion was conclusively proved when the total amount in the client's account shrank below the total amount due to the complainants.

When the second instalment of RM33,250 was paid in on 19 October 1987, the total credit balance was RM157,258.79, of which RM66,500 belonged to the complainants. On 17 November 1987, the total credit balance had shrunk to RM5,246.79. The only inference from this is that out of the complainants' RM66,500, the accused had converted to his own use RM61,253.21 by that day. The third and fourth instalments were paid in on 18 November and 27 November 1987. On this day the total credit balance after these payments was RM68,496.79. It should have been at least RM133,000 on the assumption that the complainants were the only clients left whose money had not yet been paid out of this account. Thereafter the total credit balance progressively shrank to RM39.69. The only inference is that since 17 November 1987 the accused dissipated the third and fourth instalments also.

We must now deal in depth with another submission advanced by Encik Shahul Hameed on behalf of the accused because if this submission represents the thinking of even a small segment of the legal profession, it must be corrected immediately.

The submission originated from the concept that once the complainants' money was paid into the accused's client's account, it lost its individual identity, and merged with the total balance in the client's account. Since a solicitor could maintain more than one client's account in one or more banks it was submitted that even if the amount in the Bank of Commerce client's account was not enough to meet his liabilities to the complainants, the accused would have not committed any offence if there were enough moneys in these other accounts which the accused could have used to pay the complainants. There was no evidence that any such other accounts ever existed. Nevertheless, it

was contended that since the prosecution had not shown that the accused did not have client's accounts other than the one in the Bank of Commerce and that these other accounts did not contain funds in excess of the subject matter of the charges the prosecution had failed to prove its case.

My first response to this is that the prosecution cannot be expected to prove a negative. All it needed to show was that the complainants' moneys had been paid into a particular account and that those moneys had been converted. The contention that there was another client's account where other moneys were being kept in reserve to meet this liability goes to defence and s. 106 of the Evidence Act applies. That burden is on the accused because it is a fact specially within his knowledge. The cases are all listed in the *Consolidated Subject Index of the Malaysian Law Journal 1932-1991* at pp. 551-552.

Would it have helped the accused if he had led evidence to show that he had other client's accounts where individually or cumulatively the credit balances therein had exceeded RM133,000? The accused and Encik Shahul Hameed obviously thought so. It has therefore become necessary to disabuse both of them and anybody else who holds this view that this emphatically **NOT** so.

Whilst the Solicitors' Account Rules 1978 r. 3(2) permits a solicitor to maintain more than one client's account, r. 7(a)(i) only permits the withdrawal of a client's money "for a payment to or on behalf of **the** client."

The complainants' money (RM133,000) was paid into the Bank of Commerce client's account. The effect of r. 7(a)(i) is that this money could only be taken out to pay the complainants or to their order. To use one client's money to settle a solicitor's liability to some other client is a criminal offence. A client's account in bank A is impressed with a trust only for all those individual clients whose moneys have been deposited there (say X, Y and Z). Another client's account in bank B may contain the moneys of clients L, M and N. A solicitor who removes moneys from bank B in this example to pay a client in bank A does so at his peril.

In conclusion, I would observe that the accused abused the trust reposed on him and got what he richly deserved. What we urgently need to do is to inquire why the existing sanctions have failed to deter this kind of miscreant and whether more aggressive measures should be instituted.

Abdul Malek Ahmad J:

I have read the judgments of my learned brothers Shaik Daud JCA and Mahadev Shankar JCA and agree with the reasoning expressed therein. The whole appeal rested on the construction of s. 90A of the Evidence Act 1950 and whether one applies logic and common sense or the basic rules of

legislative interpretation, the finding of my learned brother Judges appears to be the only conclusion that can be reached as regards the effect of the said section. The appeal is accordingly dismissed.

Reported by WA Sharif